

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
DARIN JOHN METCALF,)	CASE NO. 04-33484 HCD
)	CHAPTER 7
)	
DEBTOR.)	

Appearances:

Mary L. Kohn, Esq., attorney for debtor, Law Offices of Mary Kohn, 52303 Emmons Road, Suite 15, South Bend, Indiana 46637; and

Bruce D. Huntington, Esq., attorney for creditor, Botkin & Hall, LLP, 105 East Jefferson Blvd. Suite 400, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 13, 2005.

Before the court is the “Motion to Avoid Judicial Lien on Exempt Property Under Section 522(f)(1)(A),” filed by the debtor Darin John Metcalf (“debtor”) on December 24, 2004. The creditor, Steel Storage, Inc. (“Steel Storage” or “creditor”) filed its objection on January 12, 2005. The court held a hearing on the debtor’s motion on March 8, 2005, and an evidentiary hearing on valuation of the debtor’s property on May 11, 2005. Following the second hearing, the court took the matter under advisement. For the reasons that follow, the court finds that the value of the debtor’s property is \$20,000.00. It grants in part and denies in part the debtor’s Motion.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(K) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1)

and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

On March 8, 2004, Steel Storage obtained a judgment against the debtor in the St. Joseph Circuit Court in the sum of \$30,108.82. On June 24, 2004, the debtor filed his voluntary chapter 7 petition in bankruptcy and one month later, on July 23, 2004, he filed a motion to avoid Steel Storage's judicial lien on his real estate ("First Motion"). In the motion, the debtor described the real estate as "Lot Numbered Seventeen" ("Lot 17") in the Mohawk Farms Subdivision in Baugo Township, Elkhart County, Indiana. Steel Storage objected to the motion, and the court set the matter for a hearing on November 18, 2004. At the hearing, Mr. Huntington appeared on behalf of the creditor; however, Ms. Kohn, the attorney for the debtor, did not appear. After hearing the evidence and reviewing the record, the court denied the debtor's Motion to Avoid Judicial Lien. *See* R. 27, Order of November 22, 2004. No appeal was filed. The debtor was discharged on November 30, 2004, and the case was closed on December 8, 2004.

On December 27, 2004, the debtor filed a motion to reopen his chapter 7 case and another motion to avoid Steel Storage's judicial lien ("Second Motion"). The court reopened the case on January 5, 2005.

The Second Motion to avoid lien is the one presently before the court. In that motion, the debtor acknowledged that Steel Storage held a judicial lien on the debtor's two pieces of property, Lots 16 and 17 of the Mohawk Farms Subdivision in Elkhart. The debtor argued that the lien impaired an exemption to which the debtor would be entitled and thus that he was entitled to avoid the creditor's judicial lien on that property. The creditor Steel Storage filed an Objection. It first pointed out that the court's denial of the debtor's First Motion, by Order of November 22, 2004, was *res judicata* on this issue. It further argued that the debtor had failed to

disclose his ownership of Lot 16 in his original Schedules A and C. Finally, it asserted that Lot 16 was not exempt residential property and that the debtor was not entitled to avoid Steel Storage's judicial lien on that property. The court set the Second Motion for hearing on March 8, 2005.

At the hearing, the court initially stated, for the record, that the debtor's attorney had failed to appear at the November 18, 2004 hearing on the debtor's First Motion to avoid lien and that the court, after hearing the evidence and arguments of the creditor, had denied the debtor's First Motion in its Order of November 22, 2004. The debtor's attorney responded that she had forgotten to calendar the original motion and that it was simply a mistake. She further explained that, once the creditor's attorney had informed her that the debtor owned two pieces of property – the debtor's residential real estate (Lot 17) and the adjoining property with the residence's septic system (Lot 16) – the debtor's attorney filed amended schedules A and C. *See* R. 25. Debtor's counsel insisted that the court's Order of November 22, 2004, did not have a *res judicata* effect on the present motion because this motion was based on the newly filed amended schedules and on the new information that the debtor owned two separate properties. In reply, the creditor's attorney repeated that the court's November 22, 2004 Order resolved the issue. The creditor's unavowed lien should be applied to the debtor's property, he argued. He also alleged that the debtor had known, when he filed the schedules, that there were two pieces of property, and that he deliberately failed to disclose the second lot for which there was no mortgage. After hearing the arguments of counsel, the court scheduled an evidentiary hearing to require the debtor to testify under oath about the two lots and to determine the value of Lot 16.

At the evidentiary hearing, held May 11, 2005, neither party disputed that the creditor holds a judicial lien in the amount of \$30,108.82 on the debtor's two lots in the Mohawk Farms Subdivision: Lot 17, which is tenancy by the entireties property owned jointly by the debtor and his wife; and the adjoining Lot 16, which the debtor purchased later in his own name and which is undeveloped. The family residence is on Lot 17 and the septic system for the home is on Lot 16.

Counsel for the debtor explained the reason for filing a Second Motion to avoid Steel Storage's lien. According to Ms. Kohn, the debtor originally claimed an exemption in the double lot as a single property because the septic system was necessary to the house. However, once the debtor's counsel realized that the two lots were designated as separate plats, were purchased at different times, and were owned separately, she filed an amendment to the schedules and claimed an exemption value in each of the properties.¹ In counsel's view, the value of Lot 16 was only \$10.00: It held no value as an independent property, but had value as a necessary addition to the house on Lot 17. Counsel for Steel Storage, in response, emphasized that Lot 16 was not entireties property and was never platted with Lot 17 into one lot. He insisted that the unimproved Lot 16 was not exempt as entireties property and that the creditor's lien did not impair an exemption to which the debtor was entitled.

The parties presented evidence of the value of the debtor's properties. The debtor's expert witness was Robert L. Huddlestun, an experienced certified general appraiser. He described each lot: Lot 17 has a six-bedroom house, a large in-ground pool, a deck, patio and sprinklers. Lot 16 is fenced; it has the septic field for the house and a pad for an additional garage. Mr. Huddlestun appraised the debtor's two lots together, as a single residence, at a fair market value of \$330,000.00 as of May 6, 2005. He appraised Lot 16 separately at a fair market value of \$22,000.00. He pointed out, however, that Lot 16 contributes to the value of the debtor's house but cannot be used to build another residence. Because its septic field is necessary to the house adjoining it, Lot 16's contributory value to the developed Lot 17 was \$6,600.00, he opined.

The creditor's expert witness was Justine Cline, an appraiser licensed in Indiana. She appraised Lot 16 separately from Lot 17. Using a sales analysis comparable to that used by Mr. Huddlestun, she established the market value of Lot 16 as "vacant land to be sold," and estimated the value to be \$20,000.00.

¹ The debtor's original schedules listed only the residential real estate, valued at \$395,000.00, with a claimed exemption of \$73,344.61. The amended schedules listed the residential real estate with the same current market value, \$395,000.00, a secured claim of \$321,655.39, and a claimed exemption of \$73,344.61. The amended schedules also listed the lot adjacent to the residence, Lot 16, and stated that its current market value was \$10.00, the secured claim was \$0.00, and the value of the claimed exemption was \$10.00. In addition, the amended schedules listed exemptions of \$50.00 in bank accounts, \$2,000.00 in household goods, and \$200.00 in an IRA.

The debtor also gave his opinion of the value of his property. He testified that he bought Lot 16 to provide the septic area for his home on the adjoining lot. He purchased it for \$18,500.00, without including it in the mortgage for the residential real estate. The warranty deed is in his name alone, he stated. In his opinion, the resale value of the land is \$0.00, because no one can build on it, but it is necessary to his home next door.

In closing arguments, the debtor's attorney asserted that Lot 17 was not at issue because it was property held in tenancy by the entirety, but that Lot 16 was subject to a lien which the debtor was entitled to avoid. Debtor's counsel mentioned that, under Indiana law, the debtor was entitled to an exemption up to \$4,000.00 in Lot 16. In response, the creditor's attorney insisted that Lot 16 was separate property and should be valued as such.² Debtor's counsel reiterated that the debtor was entitled to the exemptions listed on the Amended Schedule C and to the avoidance of the creditor's lien. The court then took the property valuation and the lien avoidance issue under advisement.

Discussion

The debtor twice has asked the court to allow him to avoid the creditor's judicial lien to the extent the lien impairs an exemption to which he would have been entitled. After the debtor's attorney failed to appear at the hearing on the First Motion to Avoid Judicial Lien, the court denied the debtor's motion to avoid Steel Storage's lien on the merits and for failure to prosecute. *See* R. 27, Order of November 22, 2004. Neither an

² In closing arguments, Steel Storage's attorney also raised an argument based upon the underlying state court judgment. Counsel told the court that the state court ruling was a judgment in tort based on fraud – based in particular on bad checks drawn on insufficient funds. Therefore, he asserted, the debtor could not avoid the lien on his property by claiming an exemption of any amount. This court finds, however, that the judgment never was admitted into evidence; moreover, the parties did not raise those state court issues or conclusions in the pretrial order or at trial. For that reason, the court finds that the allegations improperly raised in closing arguments will not be considered. *See* Fed. R. Bankr. P. 7016(e); *Gorlikowski v. Tolbert*, 52 F.3d 1439, 1445 (7th Cir. 1995) (pre-trial order limits evidence and issues at trial); *All Trac Transp., Inc. v. Transportation Alliance Bank (In re All Trac Transp., Inc.)*, 306 B.R. 859, 894 (Bankr. N.D. Tex. 2004) (if contested fact is not listed in pretrial order, it will not be considered further). The court notes as well that, in the Indiana Supreme Court case *Gentry v. Purcell*, 84 Ind. 83, 83 (Ind. 1882), cited by Steel Storage, the judgment that “show[ed] beyond dispute that the cause of action was a tort” was placed in evidence. In this case, the judgment was not proffered and the court declines to address allegations raised for the first time after trial in closing arguments by the parties.

appeal of the order nor a motion to alter, amend, or reconsider was filed. Instead, the debtor, by counsel, filed amended schedules and a motion to reopen.

The Order granting the debtor's First Motion to Avoid Judicial Lien was a final, appealable order. *See U.S. v. Ehlen (In re Ehlen)*, 207 B.R. 179, 181 (W.D. Wisc. 1997); *Bank of Cushing v. Vaughan (In re Vaughan)*, 311 B.R. 573, 577 (B.A.P. 10th Cir. 2004). The court finds that neither the filing of amended schedules nor the motion to reopen substitutes for a request for judicial review of the court's final order. The court also finds that the debtor's attorney, whose only reason for not appearing at the hearing was that she failed to mark her calendar, did not present the requisite "cause" for the court to reconsider its earlier determination. The court determines, therefore, that its Order of November 22, 2004 is final, that Steel Storage still holds a judicial lien on Lot 17, and that the debtor has not succeeded in avoiding the consequences of the Order.

Nevertheless, the court granted the debtor's motion to reopen his case so that he could amend his claimed exemptions and seek to avoid the creditor's judicial lien with respect to the second property, Lot 16. In the court's discretion, a case may be reopened "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(a). The debtor presented new evidence of that property in his Amended Schedules A and C. Because the debtor did not delay an inordinate length of time before asking to reopen the case, *see In re Bianucci*, 4 F.3d 526, 529 (7th Cir. 1993), the court found it appropriate to grant the motion to reopen.

Presently before the court, therefore, is the debtor's Second Motion to Avoid Judicial Lien and Steel Storage's Objection to it. The court now considers whether the debtor can avoid Steel Storage's judicial lien on Lot 16 because it impairs his claimed exemption. According to the undisputed facts, the property was purchased in August 2000 for \$18,500.00, and the two expert witnesses appraised its value, as of May 2005, at \$20,000.00 and \$22,000.00. On November 19, 2004, when the debtor filed his amended schedules, he listed the current market value of the property at \$10.00 and the value of the claimed exemption also at \$10.00. The property is encumbered by the \$30,108.82 judicial lien of Steel Storage.

The value of property that a debtor seeks to claim as exempt is the fair market value of that property on the date that the debtor filed his petition in bankruptcy. *See* 11 U.S.C. § 522(a)(2); *Polis v. Getaways, Inc. (In re Polis)*, 217 F.3d 899, 902 (7th Cir. 2000). In this case, however, the debtor initially did not list Lot 16 and therefore proffered no valuation of it as of the date of the bankruptcy filing. On his amended schedules, he listed the market value of that property at \$10.00. The court has considered the two expert appraisals of \$22,000.00 and \$20,000.00, the August 2000 purchase price of \$18,500.00, and the listed valuation of \$10.00. After reviewing all the evidence and observing the demeanor of the witnesses, the court finds that the valuation of the experts differed only slightly and was more credible than the debtor's opinion of the property's worth. It determines that the value of Lot 16 was \$20,000.00.

The Bankruptcy Code allows a debtor to exempt from his bankruptcy estate certain types of property or interests in property. *See* 11 U.S.C. § 522(b). "An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtors." *Owen v. Owen*, 500 U.S. 305, 308, 111 S. Ct. 1833, 1835, 114 L.Ed.2d 350 (1991). Section 522(d) lists the exemptions that a debtor may claim, but § 522(b)(2)(A) allows states to opt out of the federal list and create their own exemptions. In Indiana, an opt-out state, a debtor must select the exemptions provided in the state statutory scheme established by Indiana Code § 34-55-10-2. In this case, in his amended schedules the debtor claimed entitlement to an exemption under § 34-55-10-2(b)(2), which exempts up to \$4,000.00 for "other real estate or tangible personal property." The facts undisputedly indicate that Lot 16 is real estate that is not the debtor's personal residence. It was undeveloped property purchased individually by the debtor, rather than jointly with his wife, after their residence was purchased, and there are no liens on it. Indeed, the creditor does not challenge the debtor's choice of § 34-55-10-2(b)(2)(A) as the appropriate exemption claimed for Lot 16. The \$4,000.00 total exemption amount "must be divided between non-residential real estate and tangible personal property." *In re Berryhill*, 254 B.R. 242, 244 (Bankr. N.D. Ind. 2000). In this case, the debtor's Amended Schedule C claimed an exemption of \$2,000.00 in tangible personal

property (household goods). The debtor therefore could have claimed the remaining \$2,000.00 exemption in Lot 16, but he chose instead to claim a \$10.00 exemption.

Because a judicial lien may interfere with the “fresh start” the Bankruptcy Code gives debtors, it may be avoided under § 522(f). That provision permits a debtor to avoid a judicial lien to the extent it “impairs an exemption to which the debtor would have been entitled.” § 522(f)(1). Under that section, the debtor can avoid a particular judicial lien if, in order to satisfy it, he would have to use assets he is otherwise entitled to set aside from the bankruptcy estate as an exemption. He or she, as the movant, “bears the burden of proving by a preponderance of the evidence all the elements required to establish his entitlement to lien avoidance under section 522(f).” *Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68,74 (B.A.P. 8th Cir. 2001). Section 522(f)(2)(A) sets forth a formula for determining whether a lien impairs an exemption to which the debtor would be entitled:

[A] lien shall be considered to impair an exemption to the extent that the sum of –

- (i) the lien;
- (ii) all other liens on the property; and
- (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor’s interest in the property would have in the absence of any liens.

11 U.S.C. § 522(f)(2)(A). In this case, there is only one lien on the property, Steel Storage’s \$30,108.82 judicial lien. The amount of the exemption that the debtor could claim is \$2,000.00. The sum of the lien and the exemption, \$32,108.82, is greater than the value of the debtor’s property, which the court found to be \$20,000.00. The court finds, therefore, that the lien impairs the exemption.

However, the “[a]voidance of judicial liens under § 522(f) is not an ‘all- or- nothing matter’; a debtor is permitted to avoid only that portion of the judicial lien that infringes upon the exemption to which he is entitled.” *Garran v. SMS Fin’l V, LLC (In re Garran)*, 338 F.3d 1, 5 (1st Cir. 2003) (quoting *East Cambridge Savings Bank v. Silveira (In re Silveira)*, 141 F.3d 34, 35-36 (1st Cir. 1998)); accord, *Tedeschi v. Falvo (In re Falvo)*, 227 B.R. 662, 666-67 (B.A.P. 6th Cir. 1998); *Lindsey v. Spagnol (In re Lindsey)*, 313 B.R. 390, 394-95

(Bankr. W.D. Pa. 2004). In the Seventh Circuit, Judge Squires concluded “that the line of cases which allows for partial avoidance of the lien is the better view because the statute employs the phrase ‘to the extent that’ and not the word ‘if.’ Thus, a partial lien avoidance is contemplated by the statutory language in contrast to an all or nothing result.” *In re Vokac*, 273 B.R. 553, 556 (Bankr. N.D. Ill. 2002) (citing cases). This court agrees that the statute limits the scope of the debtor’s ability to avoid a lien and allows avoidance only to the extent of the impairment.

In determining the amount of the exemption to which a debtor is entitled, the court recognizes that the exemption of the debtor’s interest in property “is limited to a dollar amount.” *In re Barksdale*, 281 B.R. 548, 551 (Bankr. D. N.J. 2002); *see also In re Forti*, 224 B.R. 323, 326-27 (Bankr. D. Md. 1998). “[W]here, as here, the debtor claims an exemption in an amount less than the value of the exempt asset, the balance of the debtor’s interest in the exempt asset over the exemption amount remains property of the estate.” *In re Barksdale*, 281 B.R. at 552 (citing cases). In this case, the debtor claimed a \$10.00 exemption in property valued at \$20,000.00. The court finds, therefore, that the debtor claimed an exemption in only a partial interest of the asset.

The cases teach that, when a debtor claims property of a certain value as exempt on Schedule C, but values the exemption for that property at \$0.00, the debtor has no exemption. *See In re Berryhill*, 254 B.R. at 244 (concluding that “a claimed exemption of \$0.00 is the equivalent of no exemption whatsoever”); *In re Forti*, 224 B.R. at 326-27 (same). Similarly, when a debtor claims an exemption that is less than the current market value of the property, the debtor is limited to the stated value of the exemption. *See In re Soost*, 262 B.R. at 72-74 (holding “that the debtor’s \$1.00 exemption effectively exempted an interest in the subject real estate equal to \$1.00 in value, nothing more”); *see also Addison v. Reavis*, 158 B.R. 53, 55 (E.D. Va. 1993), *aff’d sub nom. In re Grablowski*, 32 F.3d 562 (4th Cir. 1994) (per curiam) (unpub’d disposition) (affirming finding that the debtor’s \$1.00 claimed exemption of his interest in partnerships was limited to the precise amount listed as exempt); *In re DeSoto*, 181 B.R. 704, 711-12 (Bankr. D. Conn. 1995) (finding that the debtors’ \$1.00 exemption interest in stock entitled them to only \$1.00 of the stock).

The court finds, therefore, that under § 522(f) the debtor is limited to the claimed value of the exemption, \$10.00, as was stated on his Amended Schedule C. The judicial lien of Steel Storage is avoidable only to the extent of \$10.00. *See In re Soost*, 262 B.R. at 75 (affirming the bankruptcy court's order avoiding the judgment lien in the amount of the \$1.00 exemption, even though the property was valued at \$26,000.00). The remainder of the creditor's judicial lien is not avoidable and remains valid and enforceable to the extent of \$30,098.82. Accordingly, the court grants in part the debtor's motion to avoid the judicial lien of Steel Storage, to the extent that it impaired the \$10.00 exemption the debtor claimed in Lot 16, and denies the motion as to the remainder of the creditor's judicial lien.

Conclusion

For the reasons stated above, the court grants in part and denies in part the debtor's Second "Motion to Avoid Judicial Lien on Exempt Property under Section 522(f)(1)(A)," filed on December 24, 2004. After determining that the value of the debtor's Lot 16 is \$20,000.00, the court partially avoids the judicial lien of Steel Storage, to the extent of the debtor's claimed exemption of \$10.00, but denies the avoidance of the remainder of the judicial lien. The remaining amount of the lien remains a lien on the property.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT